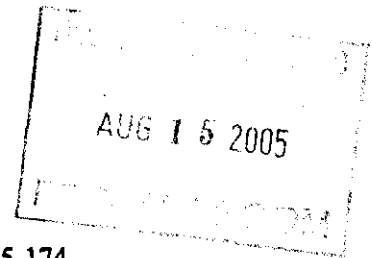


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of

Allband Communications Cooperative
Petition for Waiver of Sections 69.2(hh) and 69.601
of the Commission's Rules

WC Docket No. 05-174

ORDER

Adopted: August 11, 2005

Released: August 11, 2005

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the request of Allband Communications Cooperative (Allband) for waiver of sections 69.2(hh) and 69.601 of the Commission's rules. We also grant Allband waivers of the definition of incumbent local exchange carrier (LEC) in Part 36 and section 54.5 of the Commission's rules to the limited extent necessary to permit it to receive universal service support based on its own costs. These waivers will permit Allband to be treated as an incumbent LEC for the purposes of receiving universal service support and participating in National Exchange Carriers Association (NECA) tariffs and pools. We also grant the request of Allband for waiver of certification and data filing deadlines contained in Part 54 of the Commission's rules. Specifically, we waive the October 1, 2004 data filing deadline set forth in section 54.301(b) of the Commission's rules for local switching support (LSS), the October 1, 2004 deadline set forth in section 54.314(d) of the Commission's rules for state certification of support for rural carriers, and the March 31, 2005 and July 31, 2005 data filing deadlines set forth in section 54.903(a) of the Commission's rules for interstate common line support (ICLS). These waivers will ensure that Allband is able to collect access charges and universal service funding in a timely manner. Based on the record, we find that all of these waivers are in the public interest because they will facilitate the ability of Allband to serve previously unserved areas.

II. BACKGROUND

A. Allband

2. On April 7, 2005, Allband filed a petition requesting a waiver of sections 69.2(hh) and 69.601 of the Commission's rules.¹ Allband is a LEC formed under the laws of the state of Michigan in 2003.² Allband states that it has one exchange located in a previously unserved area in the northeast

¹ Allband Communications Cooperative Petition for Waiver of Sections 69.2 and 69.601 of the Commission's Rules, WC Docket No. 05-174 (filed April 7, 2005) (Allband Petition); Public Notice, 20 FCC Rcd 8450 (WCB 2005). One comment and one reply comment, both supporting Allband's request, were filed in response to Allband's petition. See Comments of Fred Williamson and Associates, Inc. (filed May 19, 2005); Reply Comments of the Michigan Public Service Commission (filed June 2, 2005).

² See Allband Petition at 2.

portion of the lower peninsula of the state of Michigan.³ Allband explains that, in 2004, the Michigan Public Service Commission (MSPC) granted it a temporary license to provide basic local exchange service in the proposed new exchange service territory.⁴ Allband asserts that its proposed service area never has been included in the local exchange service territory or study area of Verizon, the adjacent incumbent LEC.⁵

3. Allband would like to join NECA “in order to minimize its administrative expenses and maintain stable access rates.”⁶ It states that its intended customer base of approximately 300 access lines is too small to support the expenses associated with preparing, filing, and maintaining its own interstate access tariff.⁷ Additionally, Allband asserts that it will be unable to maintain stable access rates “if certain critical expenses or demand factors fluctuated significantly.”⁸ Allband explains that it is unable to join NECA and participate in NECA tariffs and pools because sections 69.601(a) and 69.2(hh) of the Commission’s rules limit NECA’s membership to incumbent LECs, as defined in section 251(h)(1) of the Communications Act of 1934, as amended (the Act).⁹ Thus, Allband seeks waiver of these rules in order to become a member of NECA and participate in NECA tariffs and pools.¹⁰

4. On June 14, 2005, Allband filed a letter in this proceeding stating its intent to seek federal universal service support, and requesting waiver of any sections of Parts 36 and 54 of the Commission’s rules necessary for it to be treated as an incumbent LEC for the purposes of imposing access charges and receiving federal universal service support.¹¹ Allband also requested waiver of certification and data

³ *Id.*

⁴ *See id.* at 3; *see also* Letter from Ronald Choura, Supervisor, Service Quality, Communications Division, Michigan Public Service Commission, to Gary Seigel, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 05-174 (filed April 26, 2005) (MPSC April 2005 Letter).

⁵ *See* Allband Petition at 3. The Michigan Public Service Commission also states that Allband’s proposed exchange is not part of any exchange or study area. *See* MPSC April 2005 Letter; Letter from Ronald Choura, Supervisor, Service Quality, Communications Division, Michigan Public Service Commission, to Gary Siegel, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 05-174 (filed May 18, 2005) (MSPC May 2005 Letter).

⁶ *See* Allband Petition at 5.

⁷ *See id.* at 4-5.

⁸ *See id.* at 5.

⁹ *See id.* at 2. Section 69.601(a) of the Commission’s rules states that NECA “shall be established in order to prepare and file access charge tariffs on behalf of all *telephone companies*.” *See* 47 C.F.R. § 69.601(a) (emphasis added). “Telephone company” is defined in section 69.2(hh) of the Commission’s rules as “an incumbent LEC as defined in section 251(h) of the 1934 Act as amended by the 1996 Act.” 47 C.F.R. 69.2(hh). Section 251(h)(1) of the Act defines an “incumbent LEC” as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act, or a successor or assign of such an entity. *See* 47 U.S.C. § 251(h)(1).

¹⁰ *See* Allband Petition at 1.

¹¹ *See* Letter from Paul M. Hartman, General Manager, Allband Communications Cooperative, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-174 (filed June 14, 2005) (Allband Letter).

filing deadlines contained in Part 54 of the Commission's rules that would prevent it from beginning to receive high cost loop, local switching, or interstate common line support on the date on which it would otherwise be entitled to receive such support.¹²

B. Standards for Waiver

5. Generally, the Commission may waive its rules for good cause shown.¹³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁵ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.

III. DISCUSSION

A. Waiver Requests

6. We conclude that it is consistent with Commission precedent and the public interest to grant the waivers sought by Allband, as set forth below. Neither the Commission's rules regarding participation in NECA tariffs and pools nor its rules regarding universal service support for incumbent LECs provide for a company, such as Allband, that came into existence after the enactment of the Telecommunications Act of 1996.¹⁶ Parts 54 and 69 of the Commission's rules define "incumbent LEC" as that term is defined in section 251(h)(1) of the Act.¹⁷ Section 251(h)(1), in turn, defines an "incumbent local exchange carrier" as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act, or a successor or assign of an incumbent LEC.¹⁸ Because Allband is a newly established carrier and is not a successor or assign of an incumbent LEC,¹⁹ it does not meet the definition of incumbent LEC for purposes of the Act or these rules. In order to be treated as an incumbent LEC for purpose of receiving universal service support and imposing access charges, therefore, Allband seeks waiver of these rules.

¹² See *id.*

¹³ 47 C.F.R. § 1.3.

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

¹⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 amended the Communications Act of 1934. 47 U.S.C. §§ 151 *et seq.*

¹⁷ See 47 C.F.R. §§ 51.5, 54.5, 69.2(hh). Unlike Parts 54 and 69 of the Commission's rules, Part 36 does not include a definition of incumbent LEC. The term "incumbent local exchange carrier" is used throughout Part 36, however, and in some cases references the Commission's definition of rural incumbent LEC in section 54.5 of the Commission's rules. See, e.g., 47 C.F.R. § 36.622(a).

¹⁸ See 47 U.S.C. § 251(h)(1).

¹⁹ See Allband Petition at 1-2.

7. One factor the Commission may consider is whether the requested waiver would result in more effective implementation of overall policy.²⁰ Parts 36, 54, and 69 of the Commission's rules identify the amount of universal service support incumbent LECs may receive and regulate the access charges that they may impose. The incumbent LEC restrictions in Parts 36, 54, and 69 distinguish incumbent LECs from competitive carriers for purposes of calculating universal service support and access charges.²¹ We find that it is consistent with these purposes and the Commission's 2004 *Skyline Order*²² to waive Part 36 and sections 54.5 and 69.2(hh) of the Commission's rules to the limited extent necessary to permit Allband to be treated as an incumbent LEC for purposes of receiving universal service support and participating in NECA tariffs and pools.²³ We further find that Allband has demonstrated that special circumstances warrant granting the requested waivers.²⁴ Participation in NECA pools will allow Allband to avoid the costs of filing and maintaining its own company-specific interstate tariffs. Because Allband is a relatively small company, the costs of preparing company-specific tariffs could be disproportionately high.²⁵

8. We also find that it is consistent with the Bureau's 2005 *Skyline Order*²⁶ to waive the October 1, 2004 data filing deadline set forth in section 54.301(b) of the Commission's rules for local switching support (LSS), the October 1, 2004 deadline set forth in section 54.314(d) of the Commission's rules for state certification of support for rural carriers, and the March 31, 2005 and July 31, 2005 data filing deadlines set forth in section 54.903(a) of the Commission's rules for interstate common line support (ICLS).²⁷ Waiver of these deadlines will allow Allband to begin receiving high cost loop, local switching,

²⁰ E.g., *WAIT Radio*, 418 F.2d at 1159.

²¹ For purposes of calculating universal service support, Part 36 of the Commission's rules applies to incumbent LECs, and Part 54 of the Commission's rules distinguishes between incumbent LECs and competitive eligible telecommunications carriers (ETCs). A carrier must be a rural incumbent LEC to receive support based on its own costs. For example, section 36.611 of the Commission's rules governs the submission of data to NECA for purposes of calculating high-cost support and applies only to incumbent LECs. Competitive ETCs file line count data and their support is calculated pursuant to section 54.307 of the Commission's rules. See 47 C.F.R. §§ 36.611, 54.307. In order to be a member of NECA and to participate in the NECA tariffs and pools, a carrier must be an incumbent LEC. See 47 C.F.R. § 69.2(hh).

²² *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45, Order, 19 FCC Rcd 6761, 6766-67, para. 13 (2004) (2004 *Skyline Order*).

²³ In the 2004 *Skyline Order*, the Commission waived the definition of incumbent LEC in Parts 36, 54, and 69 of the Commission's rules to permit Skyline Telephone to receive high-cost universal service support and to participate in NECA pools and tariffs. See 2004 *Skyline Order*, 19 FCC Rcd at 6771-71, paras. 25-28.

²⁴ See *WAIT Radio*, 418 F.2d 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁵ See Allband Petition at 4-5.

²⁶ See *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45, Order, 20 FCC Rcd 653 (WCB 2005) (2005 *Skyline Order*).

²⁷ Section 54.904 of the Commission's rules requires that carriers desiring to receive ICLS must file an annual certification that such support will be used as intended on the date that it first files its line count data pursuant to section 54.903. 47 C.F.R. § 54.904.

and interstate common line support on the dates it would otherwise be entitled to receive such support, absent the waived requirements.²⁸ These waivers serve the public interest in promoting universal service by helping to bring the benefits and conveniences of telecommunications to currently unserved areas.²⁹

9. Accordingly, we waive sections 69.2(hh) and 69.601 of the Commission's rules in order to allow Allband to participate in NECA tariffs and pools,³⁰ and we waive the definition of incumbent LEC in Part 36 and section 54.5 of the Commission's rules to the limited extent necessary to permit Allband to receive universal service support.³¹ We also waive the October 1, 2004 data filing deadline set forth in section 54.301(b), the October 1, 2004 deadline for state certification of support for rural carriers set forth in section 54.314(d), and the March 31, 2005 and July 31, 2005 data filing deadlines set forth in section 54.903(a) of the Commission's rules.

B. Study Area Waiver

10. The Commission froze all study area boundaries effective November 15, 1984 to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support.³² A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.³³ In the *Study Area Waiver Exceptions Order*,³⁴ the Common Carrier Bureau held that carriers are not required to seek study area waivers if: (1) a separately incorporated company is establishing a study area for a previously

²⁸ In the *2005 Skyline Order*, the Wireline Competition Bureau, on its own motion, waived state certification and data filing deadlines contained in sections 54.301(b), 54.314(d), 54.903(a) of the Commission's rules to allow Skyline Telephone to receive high-cost universal service support beginning in 2004, consistent with the Commission's intent in the *2004 Skyline Order*. See *2005 Skyline Order*, 20 FCC Rcd at 655, para. 7.

²⁹ The Commission and the Bureau have granted similar waivers in the past. See, e.g., *2005 Skyline Order*, 20 FCC Rcd at 657, para. 10; *In the Matter of Sandwich Isles Communications, Inc., Petition For Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, AAD File No. 97-82, Memorandum Opinion and Order, 19 FCC Rcd 22268 (2004); *2004 Skyline Order*, 19 FCC Rcd at 6772, paras. 29 - 31; *Petition For Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, AAD File No. 97-82, Order, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998).

³⁰ 47 C.F.R. §§ 69.2(hh), 69.601.

³¹ 47 C.F.R. Part 36, § 54.5.

³² See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*), adopting Recommended Decision and Order, 49 Fed. Reg. 48325 (1984). See also 47 C.F.R. Part 36, App. A study area is a geographic segment of an incumbent LEC's telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state.

³³ See *Part 67 Order*, 50 Fed. Reg. at 939.

³⁴ See *Request for Clarification Filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD 96-51, 11 FCC Rcd 8156, 8160, para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*), erratum, 11 FCC Rcd 8646 (Acct. Aud. Div. 1996). The Common Carrier Bureau is now known as the Wireline Competition Bureau (Bureau).

unserved area; (2) a company is combining previously unserved territory with one of its existing study areas in the same state; or (3) a holding company is consolidating existing study areas in the same state.³⁵ In the *2004 Skyline Order*, the Commission clarified that a carrier must apply for a study area waiver if it seeks to create a new study area within one or more existing study areas.³⁶ The record demonstrates that the area in which Allband intends to construct and operate its new exchange is not within the study area of any incumbent LEC.³⁷ Accordingly, because Allband does not intend to create a new study area from within one or more existing study areas,³⁸ and because it is a separately incorporated company establishing a study area for a previously unserved area, no study area waiver is required to establish a new study area for its proposed exchange.

C. Other Matters

11. On May 11, 2001, the Commission adopted an order requiring incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional separations factors beginning July 1, 2001.³⁹ In that order, the Commission addressed the recalculation of frozen allocation factors when a carrier converts from average schedule-based interstate settlements to cost-based interstate settlements.⁴⁰ In those circumstances, the carrier has not previously performed cost studies to separate certain types of costs. To address this issue, the Commission provided that rate-of-return carriers that convert from average schedule to cost company status during the freeze "shall calculate new factors based on the twelve-month period immediately following the conversion and then freeze the new factors for the remainder of the freeze."⁴¹ Similarly, because Allband has not previously performed such cost studies, it is appropriate to apply the same requirement to it, thus "eliminating the need for waiver requests to calculate new factors . . ."⁴² Specifically, Allband is required for the first twelve months of operation to categorize its telecommunications plant and expenses and develop separations factors in accordance with the separations procedures in effect as of December 31, 2000.⁴³

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the

³⁵ See *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para 9.

³⁶ See *2004 Skyline Order*, 19 FCC Rcd at 6766-67, para. 13.

³⁷ See Allband Petition at 3; see also MSPC April 2005 Letter; MSPC May 2005 Letter.

³⁸ See *Study Area Waiver Exception Order*, 11 FCC Rcd at 8160, para. 9.

³⁹ See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, 16 FCC Rcd 11382 (2001) (*Separations Freeze Order*).

⁴⁰ See *id.* at 11406, n.123.

⁴¹ See *id.* at para. 53.

⁴² See *id.*

⁴³ See 47 C.F.R. § 36.3(e).

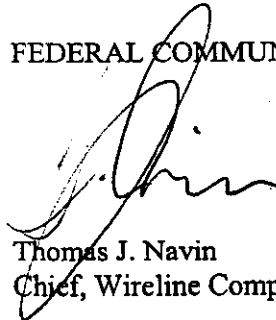
petition for waiver of sections 69.2(hh) and 69.601 of the Commission's rules, 47 C.F.R. §§ 69.2(hh), 69.601, filed by Allband Communications Cooperative on April 7, 2005, IS GRANTED, as described herein.

13. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that waiver of the definition of "incumbent local exchange carrier" in Part 36 and section 54.5 of the Commission's rules, 47 C.F.R. Part 36, §54.5, IS GRANTED to Allband Communications Cooperative for the limited purposes described in paragraph 9 herein.

14. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that waiver of the October 1, 2004 data filing deadline set forth in section 54.301(b) of the Commission's rules, the October 1, 2004 deadline set forth in section 54.314(d) of the Commission's rules for state certification of support for rural carriers, and the March 31, 2005 and July 31, 2005 data filing deadlines set forth in section 54.903(a) of the Commission's rules, 47 C.F.R. §§ 54.301(b), 54.314(d), and 54.903(a), IS GRANTED to Allband Communications Cooperative as described herein.

15. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that, for the first twelve months of operation, Allband Communications Cooperative IS REQUIRED to develop and use separation factors as described herein.

FEDERAL COMMUNICATIONS COMMISSION



Thomas J. Navin
Chief, Wireline Competition Bureau